No. 76-169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA,
Petitioner

v.

JOSEPH BARLETTA

UNITED STATES OF AMERICA,
Petitioner

v.

THOMAS FONTANELLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 1a-22a) is reported at 533 F.2d 1395. The opinions of the district court (Pet. App., pp. 27a-30a) are not reported.

JURISDICTION

The judgments of the court of appeals (Pet. App., pp. 23a-24a) were entered on April 16, 1976. A petition for rehearing was denied on June 9, 1976 (Pet. App., p. 25a). On June 30, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including August 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the Government's failure to comply with the "service of inventory" requirements of 18 U.S.C. 2518(8)(d) warrants suppression of the wiretap evidence, in circumstances where the respondents were not named in the wiretap warrant, where the Government made no effort to comply with the inventory requirements as to them, and where the first notice of their having been overheard was given them after their indictment, almost two years after the termination of the tap.[1]

STATUTE INVOLVED

Section 2518 of 18 U.S.C. provides in pertinent part:

"§2518. Procedure for interception of wire or oral communications.

* * * * *

[1] An additional question, raised in the court of appeals as to the respondent Fontanello, is shown by the following discussion in the opinion of the court below: "The disposition that we make of Fontanello's case makes it unnecessary for us to determine whether in any event the evidence was sufficient to support his conviction. We will say that the evidence against him was extremely weak and consisted of nothing but the interpretation which an FBI expert placed on one ambiguous conversation on the telephone between Fontanello and Tousa." (Pet. App., p. 22a).

"(8) . . .

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of —

"(1) the fact of the entry of the order or the application;

"(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

"(3) the fact that during the period wire or oral communications were or were not intercepted. . . ."

* * * * *

"(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval. . . ."

STATEMENT

Respondents were indicted in the fall of 1971 in the Western District of Missouri for alleged gambling activities, along with Nicholas Civella, Anthony Thomas Civella, Frank Anthony Tousa, Martin Chess and Philip Saladino.[2]

After pre-trial motions were heard and determined by Chief District Judge William Becker, the respondents and the two Civellas and Tousa were tried on Count V only by District Judge William Collinson. Respondent Fontanello waived jury trial, and was tried to the court; the others also waived jury trial and were tried by the court on a written stipulation of facts. (R. 1089) The principal evidence relied on by the government came from a wiretap and a pen register (R. 465; R. 1095) placed pursuant to orders of the district court on a pay telephone at the Northview Social Club in Kansas City, Missouri, during the period between January 8, 1970, and January 17, 1970. (R. 276).

All five were convicted and all five appealed.

The court of appeals affirmed the convictions of Nicholas and Anthony Civella and Frank Tousa,[3] but reversed as to the respondents because of the Government's total failure to comply with the requirements of 18 U.S.C. 2518 (8)(d) as to them.

[2]Chess entered a plea of nolo contendere to one count, and Saladino's case was severed and awaits trial.

[3]The Civellas and Tousa have petitioned this Court for a writ of certiorari (No. 75-1813).

The court below drew a distinction between the Government's late service of inventories on the Civellas and Tousa (13 days and 5 days late, respectively), which the court regarded as a "substantial compliance" in the absence of prejudice, and the 21-month delay in notification of the overhearings as to both respondents. The court observed that "it would be stretching things too far to say that the fact that they received full information about the interception after they were indicted in the fall of 1971 amounted to a substantial compliance with the statute." (Pet. App., p. 21a).

ARGUMENT

The petition contends (p. 5) that the issue presented in this case is presently before this Court in *United States v. Donovan*, No. 75-212. But that is not wholly the case.

The court of appeals in this case agreed with the Government's basic contention on the issue posed, i.e., that failure to meet the literal time requirements of Section 2518 (8)(d) does not automatically warrant suppression of the wiretap evidence.

As a matter of fact the court affirmed the convictions of respondents' three co-defendants despite delays of 5 and 13 days in service of inventories on them.[4] The court reasoned that such a brief delay, when unaccompanied by prejudice or governmental bad faith, is a "substantial compliance" with the requirement of the statute. (Pet. App., p. 21a.).

But the court of appeals perceived the situation as to the respondents to be "quite different," since "no effort was made to comply with the inventory requirements of the statute and those defendants received no notice of the interceptions of their communications until the third in-

[4]Those co-defendants in the district court have petitioned for certiorari on that and other grounds in No. 75-1813, filed June 16, 1976.

dictment was returned nearly two years after the authorized wiretap had come to an end." (Pet. App. A, p. 21a)

Accordingly, this Court's disposition of *Donovan* or of *Civella* will not necessarily affect the reversal in this case by the court below.

Section 2518 (8)(d) requires the judge issuing a wiretap order to cause to be served an inventory, no later than 90 days after termination of the wiretap, on the persons named in the wiretap order and on "such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice." If this requirement applies to anyone, it certainly applies to one who was overheard and whom the government contemplates for indictment.

It therefore follows that the prosecution staff, which sought and conducted the wiretap, had the affirmative obligation to bring to the issuing judge's attention the names of those persons, not named in the order, who nonetheless were overheard and are being considered for prosecution as a result of the overheard conversations.[5]

To require less would abrogate the Fourth Amendment notice requirements enunciated by this Court in *Berger v. New York*, 388 U.S. 41, at p. 60.

It is true that lower courts have divided on the question whether *any* violation of this central and functional safeguard requires suppression of the wiretap evidence. See, e.g., *United States v. Donovan*, 513 F.2d 337, certiorari granted, No. 75-212, and *Civella v. United States* (the companion to this case), *supra*, 533 F.2d 1395, petition for writ of certiorari pending, No. 75-1813. See also, *United*

[5]An FBI agent testified in the trial proceedings, that he recommended the indictment of respondent Fontanello prior to the first indictment. The respondents were not indicted until the third indictment was returned in the case. (Fontanello Trial Transcript, p. 84).

States v. Iannelli, 477 F.2d 999, 1003 (C.A. 3, 1973), affirmed on other grounds, 420 U.S. 770 (1975); *United States v. Wolk*, 466 F.2d 1143, 1145 (C.A. 8, 1972); and *United States v. Chun*, 503 F.2d 533 (C.A. 9, 1974), motion to suppress granted on remand, 386 F.Supp. 91, 96 (D. Hawaii, 1974).

But none of the cases, to our knowledge, which have been favorable to the government's position on this point involved a delay in notification approaching anything like a 21-month period of time.

The net effect of the government's contention in its petition for certiorari in *Donovan*, at pp. 14-15, is that Section 2518 (8)(d) serves no central or functional purpose in the statutory scheme whatever, so long as the 10-day notice requirement of 2518 (9)[6] is complied with. Presumably, therefore, under the government's interpretation, it could overhear an individual, seek an indictment four years later based in part on the overhearing, and still comply with the notice requirements of the statute and the Fourth Amendment by simply complying with Section 2518(9). But, as the court of appeals in this case said, that "would be stretching things too far." (Pet. App., o. 22a).

As a matter of fact, the notice as to introduction into evidence of the contents of a wiretap interception was not intended by the Congress to provide the notice required by the Fourth Amendment.

The section-by-section analysis in the legislative history of the statute states that the provision of 2518(8)(d) "reflects existing search warrant practice" and then cites Rule 41(c) of the Federal Rules of Criminal Procedure, *Berger v. New York*, *supra*, 388 U.S. 41 (1967) and *Katz v. United States*,

[6]That section prohibits receipt in evidence of the contents of an interception unless each party has been furnished, at least 10 days beforehand, a copy of the application and court order for the wiretap.

389 U.S. 347 (1967). See U.S. Code Congressional and Administrative News, 1968, p. 2194.

The analysis of 2518 (9) mentions neither *Berger* nor *Katz* nor the Federal Rules. "The 10-day period is designed to give the party an opportunity to make a pre-trial motion to suppress . . ." *Id.*, at p. 2195.

Although the court of appeals, in reversing as to the respondents, did not articulate a finding of prejudice occasioned by a 21-month delay in notification, it is manifest that such a long delay is inherently prejudicial. Such prejudice is particularly demonstrable when consideration is given to the facts involving the respondent Fontanello.

His conviction by the district court rests on the testimony of an FBI agent "interpreting" one ambiguous conversation on the telephone between Tousa and respondent Fontanello. (Pet. App., p. 22a).

It is palpably unfair, as well as a Fourth Amendment and statutory violation, to "seize" a telephone conversation and then fail to give notice to the interceptee until he has been formally charged after a delay of 21 months. Under such circumstances, the interceptee is put to a disadvantage of trying to recall a long-ago telephone call, which *may* have been casual, and to place it in context, which *may* subject it to a wholly different "interpretation" than might be given by an FBI "expert." (Pet. App., p. 22a).

It matters not what merit might be attached to the arguments of the government of "substantial compliance" or "lack of prejudice" in *United States v. Donovan* (No. 75-212) or in the companion case here, *Civella v. United States* (No. 75-1813). The lapse of 21 months in giving notification to a defendant of a seizure of his private conversations is beyond the pale by any judicial or statutory standard.

Accordingly, there is no occasion for this Court to grant the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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